NOT TO BE PUBLISHED IN
THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION ONE

GILBERT N. MICHAELS, Plaintiff and Appellant, v. WILDENSTEIN & CO., INC., Defendant and Respondent.	B126656 (Super. Ct. No.BC137720) Court of Appeal – Second District Filed March 30, 2000 Joseph A. Lane, Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen M. Lachs and Peter D. Lichtman, Judges. Reversed and remanded with directions.

Arthur E. Schwimmer; A. Charles Dell'Ario; Steiner & Saffer, David Paul Steiner and Sherry M. Saffer for Plaintiff and Appellant.

Thelen Reid & Priest, Curtis A. Cole, Gayle I. Jenkins and Natasha T. Shum for Defendant and Respondent.

In a timely fashion, a plaintiff filed suit in federal court. Two years later, the federal court agreed with the defendant that there was no subject matter jurisdiction and dismissed the federal suit. Eighteen days later, the plaintiff sued the defendant in superior court. The defendant demurred, and two of the plaintiff's causes of action were disposed of by the trial court. The defendant then moved for summary judgment, asserting the bar of limitations. The motion was granted, thereby disposing of the plaintiff's remaining claims. The plaintiff appeals. We reverse.

FACTS

Between October 1989 and May 1991, Gilbert Michaels purchased four paintings from Wildenstein & Co., Inc., a New York art dealer, for a total of about $2.5 million.[1] At the times of Michaels's purchases, Wildenstein's representatives knew that Michaels intended to open a gallery and to resell the paintings at a profit. According to Michaels, he was told by the folks at Wildenstein that he was getting the paintings for "well below their market value" and, in the "near future," would be able to sell them at a profit.

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[1] On October 30, 1989, Michaels purchased Pierre-Auguste Renoir's "Trois Grenades et Deux Pommes" for $375,000. On October 10, 1990, Michaels purchased Albert Marguet's "Femme Nue Debout dans un Atelier" for $490,000. On December 8, 1990, Michaels purchased Renoir's "L'Etang a Essoyes" for $650,000. On May 6, 1991, Michaels purchased Marquet's "Pin a Saint Tropez" for $1,025,000.

In May 1992, Michaels opened a gallery at the Peninsula Hotel in Beverly Hills. In July, Michaels asked Wildenstein about the current value of his paintings (so he would know how to price them for resale). In August, Wildenstein explained that, due to a decline in the art market, the paintings were probably worth no more than the amounts Michaels had paid for them. Michaels then turned to Sotheby's and Christie's, and was advised in August that the paintings were all worth considerably less than the amounts Michaels had paid for them.[2] Michaels asked Christie's and Sotheby's to double-check their estimates. In September and October, Christie's and Sotheby's confirmed to Michaels that his paintings were then worth about $1.5 million less than the total he paid for them.

Michaels, aware of the depressed state of the art market, then asked Sotheby's to value the paintings as of the dates Michaels had purchased them from Wildenstein. On December 14, 1992, Sotheby's advised Michaels that, in the opinion of its experts,

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[2] Christie's opined that Renoir's "Trois Grenades et Deux Pommes" (for which Michaels had paid $375,000) was worth $70,000 to $90,000; Sotheby's put it somewhere between $140,000 and $180,000. Christie's opined that Marquet's "Femme Due Debout dans un Atelier" (for which Michaels had paid $490,000) was worth between $80,000 to $100,000; Sotheby's agreed. Christie's opined that Renoir's "L'Etang a Essoyes" (for which Michaels had paid $1,025,000) was worth between $120,000 and $160,000; Sotheby's put it at somewhere between $250,000 and $350,000.

the paintings for which Michaels had paid about $2.5 million had been worth somewhere between $830,000 and $1.1 million at the time of Michaels's purchases.[3]

In June 1993, in Los Angeles, Michaels sued Wildenstein and others in federal court. In November, the case was transferred to the Southern District of New York. In June 1995, Michaels filed a second amended complaint. That fall, Wildenstein filed a motion to dismiss. On October 6, the district court dismissed Michael's action based upon "lack of diversity jurisdiction and in the discretion of the Court." On October 24, Michaels filed this action. By his first amended complaint filed in April 1996, Michaels alleged seven causes of action against Wildenstein (plus two against others who are not parties to this appeal). In August, the trial court (Hon. Stephen Lachs) sustained Wildenstein's demurrers to two of Michaels" causes of action. In

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[3] More specifically, Sotheby's opined that Renoir's "Trois Grenades et Deux Pommes" (for which Michaels had paid $375,000) had then been worth between $250,000 and $300,000; that Marquet's "Femme Nue Debout dans un Atelier" (for which Michaels had paid $490,000) had then been worth between $80,000 and $100,000; that Renoir's "L'Etang a Essoyes" (for which Michaels had paid $650,000) had then been worth between $400,000 and $600,000; and that Marquet's "Pin a Saint Tropez" (for which Michaels had paid $1,025,000) had then been worth between $100,000 and $150,000. In September 1993, Christie's estimated the value of the four paintings, as of the dates of their purchase by Michaels, at $200,000 to $250,000, $120,000 to $160,000, $300,000 to $350,000 and $150,000 to $200,000, respectively.

July 1998, the trial court (Hon. Peter D. Lichtman) granted Wildenstein'' motion for summary judgment, finding that the remaining causes of action were barred by limitations. Michaels appeals from the judgment thereafter entered.

DISCUSSION

I.

The two causes of action to which Wildenstein's demurrers were sustained were for "unfair competition" and "payment of secret commissions" (Bus. & Prof. Code, §§ 17200, 17045, 17047, 17048.)[4] Michaels says he pled facts sufficient to state these causes of action, and that Wildenstein's demurrers to his eighth and ninth causes of action should have been overruled. We agree.

A.

To plead a cause of action under section 172000 et. seq., it is necessary only to allege that members of the public are likely to be deceived. "Allegations of actual deception, reasonable reliance, and damage are unnecessary." (*Committee on children's Television, Inc. v. General Foods Corp.* (1983) 5 Cal.3d 197, 211.) Where, as here, the sufficiency of an unfair competition claim is attacked by demurrer, the truth of the plaintiff's factual allegations is admitted, and questions about the plaintiff's ability to prove his allegations are irrelevant. (*Id.* at pp. 213-214; see also

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[4] Undesignated statutory references in this part of our discussion are to the Business and Professions Code.

ABC Internat. Traders, Inc. v. Matsushita Electric Corp. (1997) 14 Cal.4th 1247, 1253.)

Michaels alleged (among other things) that, before he negotiated his purchases from Wildenstein, he had entered an agreement with an art expert, Larry Ross, pursuant to which Ross was to locate art works for acquisition by Michaels for resale at a profit. Michaels agreed to pay a commission to Ross, and Ross agreed that he would not accept a commission from any seller of art. Wildenstein knew about the agreement between Michaels and Ross, and knew Ross was not to accept a commission from any seller. Wildenstein nevertheless paid "secret commissions" to Ross, then failed to disclose those payments. Michaels alleged that the payments to Ross by Wildenstein were acts of "commercial bribery" in violation of Penal Code section 641.3 and, therefore, acts of unfair competition that "were likely to mislead the general public as well as [Michaels] in that . . . Wildenstein . . . knew or should have known that the art market was falling, yet continued to sell art to [Michaels] and other members of the general public without disclosing the significant drop in the art market, rather selling artwork as if the market was still at a high. . . . [¶] [These] unlawful, unfair and fraudulent business practices . . . constitute a threat to members of the public in California and to [Michaels] in that, unless stopped, Wildenstein . . . shall continue to make erroneous representations regarding the value of its artwork to other unsuspecting members of the public of California . . . [and] shall continue to pay secret commissions . . . constituting commercial

bribery . . . to their various art agents and runners who are bringing [to] Wildenstein . . . California clients who are purchasing works of art from Wildenstein . . . at inflated prices because of such secret commissions and commercial bribery."

In addition, alleged Michaels, Wildenstein "actively participated in a scheme designed to defraud consumers and divert customers from competitors based upon the representations that Wildenstein," one of the "world's oldest and leading old master galleries, was a joint venturer with the Pace Gallery in establishing Pace-Wildenstein [a Beverly Hills gallery that opened in September 1995]." There are more allegations about the Pace-Wildenstein gallery, and press releases allegedly approved by Wildenstein are attached to and incorporated into Michaels's first amended complaint.

B.

Wildenstein simply ignores the allegations quoted above and contends that Michaels is trying to extend the theory of unfair competition to "claims for little more than 'buyer's remorse' that arise in the context of fine art." According to Wildenstein, an art dealer's statement of opinion about the future value of fine art is mere "puffing" or "sales talk," and it cannot rise to the level of an actionable misrepresentation. Wildenstein assumes that "Michaels and Ross were partners," then concludes there could not possibly be anything actionable about Wildenstein's decision to pay a commission to Ross, notwithstanding an agreement between Michaels and Ross that forbade

Ross's acceptance of a payment from any source other than Michaels (and Wildenstein's knowledge of that agreement). These arguments are for a jury, and are not the stuff of which demurrers are made.

In short, Michaels has stated with reasonable particularity the facts supporting the statutory elements of the alleged violations. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 [by prescribing "any unlawful" business practice, section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable]; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 367 [violations of the Penal Code are indisputably "unlawful" within the meaning of section 172000].) No more was required.

II.

The trial court resolved Michaels's other causes of action in favor of Wildenstein on the ground that Michaels's claims were barred by limitations. Michaels offers several reasons to conclude otherwise. We agree with one of those reasons and therefore do not discuss the others.

A.

The federal court dismissed Michaels's complaint of October 6, 1995. This action was filed 18 days later, on October 24, 1995. Under 28 U.S.C. section 1367(d), this action was timely filed.[5]

Section 1367 defines the federal courts' supplemental jurisdiction by providing that, except as provided therein or "otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. . . ." (§ 1367(a).) Following other provisions about when the district courts do and don't have supplemental jurisdiction, subdivision (d) of section 1367 provides as follows: *"The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subdivision (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."* (Emphasis added.)

Since this action was filed within 30 days after Michaels's federal claims were dismissed, it would

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[5] Undesignated statutory references in this part of our opinion are to Title 28 of the United States Code.

appear to follow ineluctably that this action was timely.

B.

To avoid the effect of section 1367(d), Wildenstein contends that Michaels should not be allowed to "recharacterize the nature of his federal lawsuit." Wildenstein's assumption is wrong, and so too is his conclusion.

When Michaels filed his federal action in 1993, he invoked federal jurisdiction by including a RICO claim. That claim remained part of Michaels's lawsuit until June 1995, at which time Michaels filed his second amended complaint, dropped his RICO claim, and (for the first time) invoked federal jurisdiction on an allegation of diversity of citizenship. Wildenstein then moved to dismiss on the ground that diversity was incomplete. The federal court agreed, found that all parties were not of diverse citizenship at the time the federal action was filed, and concluded that, as a matter of discretion, it would decline to exercise supplemental jurisdiction over Michaels's remaining claims.

From the transcript of the hearing on Wildenstein's motion to dismiss, it is obvious that the district court judge understood that her ruling would not terminate this dispute, and that Michaels's claims would simply proceed in a different forum. After the court announced its intent to dismiss, Wildenstein's lawyer mentioned that there were "some pending depositions" and suggested that they might be

"moot." The judge disagreed, commenting that, "I don't see why. You are going to need discovery wherever you go." Plainly, the district court judge was operating on the assumption that the case was governed by section 1367(d), and that a state court action could be filed (in New York or California) within 30 days.[6]

Although Wildenstein's argument is not altogether clear, it seems to be that Michaels was required to "plead" the fact that, with the district court's permission, Michaels is pursuing this action under section 1367(d). Wildenstein cites no authority for this novel concept and we know of none. Not surprisingly, Wildenstein does not explain how it could possibly have been prejudiced by Michaels's failure to allege that everyone was gathered together in Los Angeles, Superior Court because Wildenstein had moved to dismiss the action that was previously pending in federal court in the Southern District of New York.

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[6] Although it is true, as the trial court noted, that Michaels voluntarily abandoned his RICO claim, there is no suggestion that it was "absolutely devoid of merit or obviously frivolous" at the time Michaels's original complaint was filed in federal court. Accordingly, the strength of the RICO claim does not affect Michaels's right to rely on section 1367(d). (*Glider v. PGA Tour, Inc.* (9th Cir. 1991) 936 F.2d 417, 421.) In this regard, we note that, for the entire time the RICO claim was pending – from June 1993 to June 1995 – Wildenstein did not challenge it on the merits, notwithstanding that Wildenstein did move to dismiss on procedural grounds, and did move to change venue.

We reject Wildenstein's assertion that, as applied to it, section 1367(d) "would operate in an unconstitutional fashion because it stands in opposition to principles of state sovereignty." Although Wildenstein says this case is distinguishable from *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, Wildenstein doesn't say how. We see no distinction. As Division Seven of our Court explained in *Kolani*, section 1367(d) does not create a novel concept. It simply codifies the doctrine of equitable tolling that applies when a plaintiff with several options reasonably pursues one remedy instead of another. Where, as here, (1) the defendant received timely notice of the plaintiff's claim by the filing of the federal action, (2) the defendant was not prejudiced because it had the opportunity to use the discovery tools available in the federal action to interview witnesses and gather evidence, and (3) the plaintiff's reasonableness has been shown by the timely filing of the California action within the 30-day period permitted by section 1367(d), the defendant's rights are fully protected. (*Kolani v. Gluska, supra*, 64 Cal.App.4th at pp. 409-410.)[7]

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[7] When the trial court granted Wildenstein's motion for summary judgment, it stated that Michaels's decision to pursue a RICO claim in federal court "was clearly not a choice between alternative remedies designed to lessen the extent of his injuries." Instead, said the trial court, Michaels was attempting to "maximize his damages." We are not aware of any rule that prohibits a plaintiff's efforts to "lessen the extent of his injuries" by "maximizing" the amount of damages he will be able to recover if he wins. The federal district court judge did not find

(footnote continued on next page)

Section 1367(d) does not, as Wildenstein asserts, require a state court to "hear state claims that would otherwise be stale." To the contrary, as *Kolani* recognized, it places a reasonable *limit on the plaintiff's existing right* to re-file in state court after a federal action has been dismissed. We do not see how a case filed within the time permitted by section 1367(d) could reasonably be described as "stale."

In short, Wildenstein is in the same position it would have been in had this case been filed in state court in the first instance.

(footnote continued from previous page)

fault with Michaels's pursuit of the RICO claim or with his ultimate decision to abandon it. Neither do we, nor do we find anything in this record to suggest that Michaels acted in bad faith.

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court with directions to (1) vacate its orders (a) sustaining Wildenstein's demurrers to Michaels's eighth and ninth causes of action and (b) granting Wildenstein's motion for summary judgment as to Michaels's remaining causes of action; (2) to enter new orders overruling the demurrers and denying the motion for summary judgment; (3) to make such other orders as are necessary to place Michaels's claims at issue; and (4) to place the case on track for trial. Michaels is awarded his costs of appeal.

NOT TO BE PUBLISHED.

VOGEL (Miriam A.), J.

We concur:

SPENCER, P.J.

MASTERSON, J.